

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

THE CITY OF NEW YORK, *ET AL.*

VS.

1:17-CV-1464 CMH

ALEXANDRIA, VIRGINIA
APRIL 6, 2018

THE UNITED STATES DEPARTMENT
OF DEFENSE, *ET AL.*

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by
Julie A. Goodwin.

A P P E A R A N C E S

FOR THE PLAINTIFF:

PILLSBURY WINTHROP SHAW PITTMAN LLP
By: MR. KENNETH W. TABER
1540 Broadway
New York, New York 10036
212.858.1000
kenneth.taber@pillsburylaw.com

PILLSBURY WINTHROP SHAW PITTMAN LLP
By: MS. LAURA B. LOBUE

-AND-

MR. JEETANDER T. DULANI
1200 Seventeenth Street NW
Washington, DC 20036
202.663.8000
laura.lobue@pillsburylaw.com
jeetander.dulani@pillsburylaw.com

FOR THE DEFENDANT:

UNITED STATES ATTORNEY'S OFFICE
By: MR. DENNIS C. BARGHAAN, JR.
Deputy Chief, Civil Division
2100 Jamieson Avenue
Alexandria, Virginia 22314
703.299.3700

U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION
By: MR. DANIEL HALAINEN
Trial Attorney, Federal Programs Branch
20 Massachusetts Avenue, NW
Washington, DC 20530
202.616.8101
daniel.j.halainen@usdoj.gov

OFFICIAL U.S. COURT REPORTER:

MS. JULIE A. GOODWIN, CSR, RPR
United States District Court
401 Courthouse Square
Alexandria, Virginia 22314
512.689.7587

A P P E A R A N C E S

ALSO PRESENT:

MR. OWEN CLEMENTS,
San Francisco City Attorney's Office

MS. MELANIE ASH,
New York Law Department

1 (APRIL 6, 2018, 9:59 A.M., OPEN COURT.)

2 COURTRROOM DEPUTY: Civil Action 2017-1464, *The City of*
3 *New York, et al. versus The U.S. Department of Defense, et al.*

4 MS. LOBUE: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MS. LOBUE: Laura LoBue representing plaintiffs. I'm
7 joined by my colleagues, Ken Taber and Jeetander Dulani. We're
8 also -- of Pillsbury. We're also joined by Mr. Owen Clements
9 of the San Francisco City Attorney's office and Ms. Melanie
10 Ash, Assisted Corporation Counsel for the New York Law
11 Department.

12 THE COURT: All right.

13 MR. BARGHAAN: Good morning, Your Honor. Assistant
14 United States Attorney Dennis Barghaan on behalf of the
15 defendants. With me today is Daniel Halainen from the Civil
16 Division of the Department of Justice who will argue the cause
17 this morning on behalf of the government.

18 Your Honor, we're here today on the plaintiffs'
19 motion for a preliminary injunction, the defendants' motion to
20 dismiss. I ask Your Honor how he would like to proceed with
21 argument, in what order?

22 THE COURT: I don't really care. You-all can pick the
23 order if you want.

24 MR. TABER: Your Honor, our preference is the
25 plaintiff to go forward on the preliminary injunction motion

1 first.

2 THE COURT: All right.

3 MR. TABER: Thank you, Your Honor.

4 Your Honor, we prepared a notebook, which I gave to
5 the clerk and I gave to the government that contains the key
6 exhibits that I'm going to reference during this. I hope Your
7 Honor has it in front of him.

8 THE COURT: All right. I've got it.

9 MR. TABER: Terrific. Thank you very much.

10 There are five issues, Your Honor, that I would
11 like to address, and they are not surprisingly the issues that
12 are present on every application for preliminary injunction.
13 Number one, likelihood of success on the merits; number two,
14 irreparable injury; number three, public interest; number four,
15 burden; and then finally remedy.

16 Turning first to the issue of our likelihood of
17 success on the merits, Your Honor, there are six separate
18 places all referenced in the notebook that we've given you
19 where the defendants admit that there has been two decades of
20 noncompliance with their obligations under federal law to
21 report to the FBI the identities of individuals disqualified
22 from gun ownership by virtue of military convictions or
23 dishonorable discharges.

24 The first, Your Honor, Exhibit 1, is the report
25 from the Office of the Inspector General in December of 2017,

1 just four months ago. And in that report, he describes for
2 each of the service branches what are startlingly high numbers
3 of noncompliance. That's just as of four months ago.

4 At page 2 of that same report, he says that this is
5 a problem that extends back to at least 1998.

6 Exhibit 2 is the Senate Judiciary testimony by the
7 Acting Inspector General of the Department of Defense from
8 December 6, 2017, and there at pages 15 to 16 he says that the
9 military services have failed to take his office's
10 recommendations, quote, as seriously as they should have, close
11 quotes.

12 At page 29, he says that they have failed, quote,
13 to take appropriate action to follow up on those
14 recommendations, close quotes.

15 Exhibit 2 also contains at page 10 the testimony of
16 the Secretary of the Air Force admitting that the Air Force has
17 not complied with this requirement.

18 Exhibit 3 contains a statement submitted to the
19 Senate Judiciary Committee on December 6th, 2017, saying that
20 corrections were not made retroactively as they should have
21 been and that the Air Force was not reporting as it should
22 have.

23 Exhibit 4 is the 1997 OIG report. Exhibit 5 is the
24 2015 OIG report. Together, these amount to six separate
25 admissions by the government of noncompliance with their

1 obligations under law for two decades.

2 So, what about the administrative record that's
3 been produced in this case? It's close to a thousand pages.
4 You might reasonably ask, does that explain why for two decades
5 there has been noncompliance with the law? And the answer
6 unfortunately would be, not at all. It provides no explanation
7 as to why defendants violated the law for 20 years, but doesn't
8 dispute that they did.

9 What, then, you might ask about the aftermath of
10 the Sutherland Springs tragedy in November of 2017? Your
11 Honor, despite having five months since that tragedy to address
12 this problem and cure it, it is clear now from the filings in
13 this case that the government has not cured it and does not
14 claim to have cured it.

15 There has, as Exhibit 8 in the notebook indicates,
16 that a mass submission of names by the Army, some 32,932 names
17 were submitted by them. But no other service branch, Your
18 Honor, not one has made a similar mass submission. Indeed to
19 the contrary, Exhibit 8 indicates that the Navy has submitted
20 in that five-month period just 104 new names.

21 Exhibit 6 shows the Navy promising to conduct an
22 audit, but then deferring that audit indefinitely.

23 Exhibit 7 shows the Marines saying that people
24 should, quote, expect and prepare for future remedial measures
25 which may require examination of past cases, close quotes, but

1 that hasn't happened yet either from the information that we
2 received. That's just a promise that something may happen in
3 the future.

4 Exhibit 8 has several paragraphs describing what
5 the Air Force has done, but there's no suggestion of any
6 results of the reviews that they've been conducting.

7 Still, Your Honor, as we come here today before
8 you, no timetable is offered by the government for complete
9 compliance with law. Not by the government, not by any branch
10 of the services. There's no claim being made of complete
11 compliance by the government either.

12 And so, Your Honor, on these undisputed facts and
13 with these admissions that we've placed before you, we believe
14 that all five of the TRAC factors, that's T-R-A-C, for a
15 preliminary injunction being granted in this context have been
16 established here.

17 Number one, the first test, is the rule of reason.
18 And we respectfully submit, Your Honor, that requiring
19 compliance with law is plainly reasonable. No contrary reason
20 is offered by the government for their inactions. Not in the
21 administrative record, not in any of the filings that are
22 before you.

23 Second TRAC factor is the congressional timetable.
24 Here, that is absolutely clear by statute there is a
25 requirement of quarterly reporting to the FBI, or to the

1 Attorney General to be more precise.

2 Third TRAC factor, our human health and welfare at
3 stake. The answer to that one I submit is easy. The answer is
4 yes.

5 Fourth TRAC factor, is there any interference with,
6 quote, competing priorities, close quotes? There's no
7 suggestion by the government that there are any competing
8 priorities at work here, anything that restricts them from
9 complying with law.

10 The fifth TRAC factor, Your Honor, is, quote, the
11 nature of the interest to prejudice by delay, close quotes.
12 And here, Your Honor, we would respectfully submit that the
13 nature of the incidence is potentially one of life and death,
14 as the Sutherland Springs events so starkly demonstrate.

15 And so in sum, Your Honor, on the issue of
16 probability of success on the merits, we believe that we have
17 demonstrated in our papers clear and convincing probability of
18 success, which is the standard applicable when as here
19 mandatory injunctive relief is sought.

20 So, I'll move on to the second issue for the grant
21 of injunctive relief, and that's irreparable injury.

22 Here, Your Honor, there are two kinds of
23 irreparable injury before the Court. The first arises from our
24 estimate, which is set forth in the papers, that there are
25 based on the data that's been shared with us by the government

1 approximately 15,000 disqualified individuals, people who are
2 disqualified from gun ownership, by virtue of prior convictions
3 or by virtue of dishonorable discharges, who have still not
4 been reported to the FBI. 15,000.

5 Interestingly, the government has not challenged
6 that estimate in any of the papers. Even if we're wrong and
7 off by a few thousand in either direction, the fact of the
8 matter, Your Honor, is that there are a very large number of
9 people who have already been adjudicated too dangerous to have
10 a gun, but today who can freely purchase a gun anywhere in this
11 country because their names have not been submitted into the
12 background check system. Each one of them, Your Honor, is a
13 potential human ticking time bomb. We can't name them. We
14 don't know who they are, but the defendants can, and we
15 respectfully submit the defendants must.

16 Once they do that, we, this three plaintiffs here,
17 as well as every other user of the federal gun check system can
18 immediately stop selling guns to those individuals, or stop the
19 sale of guns to those individuals, I should say, by federal
20 firearm licensees. As soon as we get that relief, this can be
21 fixed.

22 The OIG's report, Your Honor, from 2017, Exhibit 1,
23 says that pages 6 and 40 that, quote, any missing final
24 disposition report can have serious, even tragic consequences,
25 as may have occurred in the recent church shootings in Texas.

1 That's the government speaking, the Inspector General's office.
2 Those are the stakes.

3 And it's not speculative, Your Honor, because
4 they're already 26 dead Americans in Texas and 20 more who were
5 previously wounded because of this failure. How many more,
6 Your Honor, will die before this problem is solved? We think
7 the answer should be zero. We think the solution begins here
8 and it begins today.

9 So that's the first kind of irreparable injury, the
10 risk created by 15,000 or so human time bombs.

11 The second kind of irreparable injury arises
12 because each and every time these three plaintiffs, these three
13 cities run a background check search to decide whether to allow
14 people to purchase guns, to issue permits or licenses or to
15 return guns that have previously been confiscated, every time
16 they run a check with something like 15,000 names missing, that
17 check is necessarily incomplete, necessarily faulty, and
18 potentially faulty to the point of creating violence that
19 follows.

20 Once a background check is completed, Your Honor,
21 the opportunity to use the disqualifying information in that
22 database vanishes. The gun sale occurs. It doesn't matter
23 thereafter. The gun sale has occurred.

24 So that's a second form of irreparable injury here,
25 Your Honor. It's not as the government originally suggested in

1 their opposition papers a principle of parens patriae. It is
2 injury to the government, qua government, government fulfilling
3 its role under state statute to protect the public.

4 And it's not speculative injury, Your Honor,
5 because it happens every day. Every day these gun checks are
6 run, and every day that database is missing huge amounts of
7 data that belong there.

8 It's also a harm, Your Honor, that's previously
9 been acknowledged by the government. Exhibit 9 in the
10 notebook, Mr. Fine's written statement, confirms at page 3
11 that, quote, complete and consistent reporting by all DoD law
12 enforcement organizations is essential to nationwide law
13 enforcement efforts, close quotes. Again, that's not us
14 speaking; that's the defendants speaking through the Inspector
15 General.

16 This is a classic governmental function that's
17 being blocked, Your Honor, and it leads to irreparable injury,
18 the second kind of irreparable injury in this case.

19 So, now I'd like to move on to the issues of public
20 interest and burden.

21 The public interest in safety, Your Honor, is
22 self-evident. As Attorney General's -- as Attorney General
23 Sessions recently observed in the document we've included as
24 Exhibit 10, quote, NICS -- and that's the NIC system that we're
25 referring to here -- is critically important to protecting the

1 American public from firearms-related violence, close quotes.
2 Again, that's the federal government speaking.

3 And if that alone weren't enough proof of public
4 interest in this matter, Your Honor, there have been over a
5 thousand media stories about this very case confirming the
6 profound public interest in the subject raised. Those stories
7 have been on every TV network, in every major newspaper; and
8 simply put, the country is watching us here today. So that's
9 the public interest, and we think it's clear.

10 With respect to burden, Your Honor, the burden on
11 the government from what we are requesting is actually zero
12 because we are only asking that the government be compelled by
13 Your Honor to do what the law already requires them to do. And
14 it's not a new law. It's a law that's been in place for a very
15 long time.

16 So that brings me, Your Honor, to the fifth issue
17 and the final issue that I'd like to raise with the Court, and
18 that is the issue of remedy. In the notebook, we've included
19 as Exhibit 11 our proposed order. It seeks, first, to compel
20 defendants to report all disqualified individuals past and
21 present to the Attorney General by a date that would be set by
22 this Court. We would propose that date be 90 days from today.

23 Second, it asks this Court to direct the defendants
24 to prepare a compliance plan, and we would suggest 60 days for
25 that. That compliance plan, Your Honor, needs to do two

1 things. It must fix this problem retroactively for all of the
2 names that are missing from the database, and it must fix it
3 prospectively to make sure that all the new names that need to
4 be included in the database are indeed included. And we
5 suggest in our proposed order, Your Honor, that you require the
6 government to report to you on a monthly basis on their
7 progress in achieving their compliance plan and in implementing
8 that plan.

9 We do not envision this, Your Honor, as supervision
10 or anything like that on a day-to-day basis. We do not
11 envision this as supervision for years to come, as the
12 government suggests in their papers. This problem can be
13 fixed. The Army is actually taking significant steps towards
14 fixing it, although they don't say it's fixed fully. The other
15 services need to do the same. Someone, Your Honor, needs to
16 mind the store, and we suggest that that someone needs to be
17 this court.

18 We propose, Your Honor, to return to the court
19 75 days from today, hopefully at that point with a joint plan
20 to end once and for all this deadly national problem. Your
21 Honor, 20 years of delay and disobedience of the law is too
22 much. 15,000 human time bombs are too many. Today, we hope,
23 will mark the beginning of the end of this national problem.

24 Thank you.

25 THE COURT: All right.

1 MR. HALAINEN: Good morning, Your Honor. My name
2 again is Daniel Halainen from the federal defendants.

3 The question for the Court today presented by --

4 THE COURT: If you would pull that microphone up.

5 MR. HALAINEN: Sorry about that.

6 The question for the Court today presented by both
7 the government's motion to dismiss and the plaintiffs' motion
8 for a preliminary injunction is whether city governments, like
9 the plaintiffs, have the right under the Administrative
10 Procedure Act to intercede and the Department of Defense's
11 ongoing efforts to ensure compliance with the federal statute.
12 The short answer to that question is that they do not.

13 As Mr. Taber has just explained, what plaintiffs
14 are asking for today is wide-ranging judicial supervision of
15 the Department of Defense's operations, looking back for a
16 period of 20 years, including the review of the agency's
17 procedures and policies for providing information to the FBI
18 and also looking forward perspective for some indefinite
19 period of time requiring monthly supervision by this Court of
20 how the Department of Defense is going about fulfilling its
21 obligations to provide information to the FBI. And the
22 Administrative Procedure Act simply does not give the
23 plaintiffs a right to that kind of relief for three reasons:

24 First, because they don't have Article III standing
25 to bring that kind of claim; second, because the APA does not

1 provide for jurisdiction for this kind of problematic challenge
2 to how an agency operates; and third, because even if there
3 were jurisdiction, plaintiffs haven't made out a claim for the
4 kind of extraordinary mandamus relief that they're seeking
5 here. And for those reasons, we think that the motion to
6 dismiss should be granted and the preliminary injunction should
7 be denied.

8 And I'll just talk for a couple of minutes about
9 those three points that I outlined, Your Honor.

10 THE COURT: All right.

11 MR. HALAINEN: So first, with respect to Article III
12 standing, plaintiffs are alleging that they have standing here
13 because of an injury arising from reliance on FBI databases
14 that contain information provided by the Department of Defense.
15 What the Courts have made clear is when a plaintiff is seeking
16 to allege this kind of Article III injury, it's not simply a
17 question of relying on a database. When you're looking at
18 access to information, a plaintiff has to allege both that they
19 have a legal entitlement to disclosure of that information by
20 the government or the other defendant, and that the denial of
21 access to that information materializes into some concrete
22 specific harm. It can't just be that plaintiffs allege that
23 they've relied on an inaccurate or incomplete database.

24 In this case, plaintiffs can't meet either of those
25 conditions. The statute in question here governs a

1 relationship between the Department of Defense and the
2 Department of Justice, providing that the Department of Defense
3 will provide certain pertinent information to the FBI for use
4 in those databases. That does not create a legal entitlement
5 in plaintiffs to disclosure of information by defendants to
6 them, nor does it create a right to access that information
7 through a third-party means.

8 As to the concrete harm, plaintiffs are saying that
9 they allege -- or excuse me -- plaintiffs are saying that they
10 rely on the database on a day-to-day basis, but that itself is
11 not a concrete harm. And we know that from cases like the
12 Fourth Circuit's decision in *Dreher* and the DC Circuit's
13 decision in the *OOIDA* case, both of which we cite in our
14 papers.

15 What they need to establish in order to allege a
16 cognizable concrete harm is that something has happened as a
17 consequence that's concrete and material. What they allege is
18 that they may potentially issue a permit or a license to
19 somebody who is prohibited from possession of a firearm, but
20 that is a speculative injury. And what the Supreme Court has
21 said there is that it must be certainly impending in order to
22 be cognizable as an Article III injury. And the record just
23 doesn't show that here.

24 So second, even if there were Article III standing,
25 there isn't jurisdiction under the APA for this kind of

1 systematic challenge to how the Department of Defense operates.
2 What plaintiffs are asking this Court to do is look at the
3 agency at a problematic level and the policies and procedures
4 in place to ensure that information is provided by the
5 Department of Defense to the FBI and evaluate those on a
6 problematic basis.

7 But what the APA requires is the challenge to a
8 specific discrete agency action. And as we explain in our
9 papers, that's a term of art that requires meeting one of five
10 different definitions or the equivalent thereof. And
11 plaintiffs simply haven't identified that kind of agency
12 action. What they're looking for is for this Court to enforce
13 compliance with the statutory mandate, but that's simply not
14 the type of relief that's available under the Administrative
15 Procedure Act. And what this Court has said previously, and
16 the Fourth Circuit and the Supreme Court, is that these types
17 of problematic challenges are not within the jurisdiction of a
18 Court to entertain under the APA.

19 So lastly, even if there were jurisdiction either
20 through standing or subject matter jurisdiction under the APA,
21 plaintiffs would still fail to state a claim of relief in the
22 nature of mandamus, which is what they're seeking here under
23 Section 706(1) of the APA. The standards for that kind of
24 relief require a clear duty on the part of the defendant, the
25 government here, to act, to take a ministerial act, and that

1 that duty is owed specifically to the plaintiff.

2 And here, as I touched on earlier, the statute does
3 not provide any duty from the Department of Defense owed to a
4 city government, a municipal corporation like the plaintiffs.
5 And in terms of whether there's a ministerial action at issue
6 here, again, plaintiffs are seeking to enforce statutory
7 compliance writ large, and that's not a ministerial act that is
8 subject to compulsion under the APA.

9 So, for any of those three reasons, we think that
10 the motion to dismiss should be granted and that plaintiffs
11 haven't demonstrated a likelihood of success on the merits.

12 And I'll just take one minute to comment on even if
13 this Court were to deny the motion to dismiss, whether a
14 preliminary injunction should issue.

15 So, the type of preliminary injunction that
16 plaintiffs are seeking here is mandatory in nature requiring
17 the government to take action, not to preserve the status quo.
18 And that's strongly disfavored at the preliminary relief stage.
19 Similarly, the relief that they're seeking in a preliminary
20 injunction is the relief that they're seeking in the entire
21 lawsuit. So granting the preliminary relief that they're
22 seeking here would essentially end the case, and that is also
23 not appropriate at a preliminary injunction stage.

24 As to the irreparable harm issue, as we've outlined
25 in our papers, the government is already engaged in -- in

1 serious and intensive efforts to ensure compliance with the
2 statute that's at issue in this case. And what plaintiffs are
3 proposing is merely that they have before you to conduct
4 oversight over that process. And it's not clear to me in any
5 of their papers how they've explained that their oversight will
6 prevent whatever sort of irreparable injury that they're
7 suggesting.

8 And again, as I touched on earlier, the irreparable
9 harms that they're suggesting here are speculative in nature.
10 They haven't actually identified a concrete, cognizable injury.

11 So, for that reason, even if this Court were to
12 deny the motion to dismiss, the preliminary injunction should
13 not issue.

14 Unless the Court has any further questions.

15 THE COURT: No questions.

16 MR. HALAINEN: Thank you, Your Honor.

17 THE COURT: You want about 30 seconds to respond --

18 MR. TABER: I do, Your Honor.

19 First point I want to make is that you didn't hear
20 any defense from the government on any of the facts that we
21 allege. They're not contesting any of the facts that we
22 allege, so those facts should be taken as established at this
23 point.

24 The second point is their defense is largely legal
25 and really goes to their motion to dismiss. And my colleague

1 Mr. Dulani, will respond to those legal points on standing --

2 THE COURT: All right. Well, let me hear from him
3 then.

4 MR. TABER: Good. And then --

5 THE COURT: Because I've heard enough argument on
6 the -- on the injunction.

7 MR. TABER: Okay. Thank you, Your Honor.

8 MR. DULANI: Good morning, Your Honor. Jeetander
9 Dulani --

10 THE COURT: Good morning.

11 MR. DULANI: -- for plaintiffs. I'll briefly cover
12 three points here.

13 The question here that the defendants raise is do
14 the plaintiffs have standing? And the answer is unquestionably
15 yes. Can agency inaction here, which is what we're talking
16 about -- this is not an issue of an agency making a decision,
17 unless the government is telling us that they sat in a room and
18 decided to defy a clear congressional mandate, which I don't
19 think they've done. This is their failure to act, which in
20 fact is enforceable under 706(1).

21 And do mandamus principles block this suit? The
22 answer is no, because the defendants are again confusing the
23 standard from mandamus when this is an administrative action,
24 and clearly the Courts have repeatedly noted that in an
25 administrative context you look at the zone of interest. It's

1 not an issue of does the statute give you a particular duty to
2 the plaintiff. You look to the zone of interest.

3 So I'm going to briefly go through those, Your
4 Honor, and -- and I think the case law on this is quite clear.

5 So, as Mr. Taber articulated, the three plaintiffs
6 here have shown injury, in fact, because they regularly access
7 and use the NICS database every day to make decisions about who
8 should or should not be allowed to obtain a firearm. And
9 the -- as the information that they rely on is the information
10 that defendants are obligated to provide.

11 And they talked about a legal entitlement, so I
12 want to make one point that I think is really critical here,
13 Your Honor. In the Supreme Court in *Norton v. Southern Utah*
14 *Wilderness* said clearly, Courts can compel agency action when,
15 quote, an agency failed to take a discrete agency action that
16 it is required to take. That is exactly what 706(1) allows
17 for.

18 This discrete action is quite simple. They have to
19 submit all of these names no less than quarterly. We're not
20 asking for them, and we have not alleged, that we care about
21 what the Navy or the Army or the Air Force does in terms of how
22 they collect. We are not trying to direct them about how they
23 should be doing their job.

24 They have a duty. They have missed that quarterly
25 deadline for the last 20 years. And their own papers show it;

1 their own testimony shows it. So this is a discrete action
2 that they can in fact be compelled to take, and it's a
3 ministerial act.

4 Now, the Court in *Norton* was very helpful. And one
5 of the things that they said was that when you have a discrete
6 agency action that's demanded by law, that, of course,
7 includes -- and I'm quoting here -- includes, of course, agency
8 regulations that have the force of law.

9 So, it simply does not pass any muster to say that
10 their duty is to the Attorney General, Your Honor. There's an
11 entire regime of background checks here, and I want to direct
12 Your Honor to -- to a couple of -- a couple of those
13 regulations.

14 The very purpose of NICS is to -- is to facilitate
15 these background checks, and the regulations confirm that.
16 28 C.F.R. 25.6(j)(i) says, one of the express purposes of NICS
17 is to, quote, provide information to local criminal justice
18 agencies in connection with the issuance of a firearm-related
19 permit or license. 28 C.F.R. 25.6(d), the NICS will provide
20 POCs - which are plaintiffs here - with electronic access to
21 the system virtually 24 hours each day through the NCSE
22 Communication Network.

23 This is not a bare procedural violation. It's not
24 divorced from concrete harm. This is not an inner agency
25 squabble. Plaintiffs are injured. They have a right to this

1 information. Defendants have a legal obligation to provide
2 this information.

3 Your Honor, if they did not have a legal
4 obligation, why is the Inspector General testifying before
5 Congress? Why are these reports being written? It doesn't
6 make any sense. If your duty is to the Attorney General, I
7 would submit that you wouldn't be doing any of this. You would
8 be fighting with the Department of Justice and saying, hi, we
9 don't have to give this to you. The fact we didn't give you
10 all of it is -- is of no consequence.

11 And let's be clear, Your Honor, the statute and the
12 regulations do not say that the DoD gets to pick that they're
13 going to submit 25 percent, 50 percent, 75 percent. When you
14 look at those OIG reports, what you find is when you go
15 function by function some of those functions actually were 75
16 percent deficient, 95 percent deficient. That's not enough.

17 And again, we are not asking the Court, nor are we
18 asking the Court to allow us to supervise any of that
19 collection. That's their job. We're simply asking the Court
20 under 706(1) to compel the discrete agency action that this
21 Court is allowed to -- to compel because they have a duty to
22 report quarterly; simple, full stop.

23 Now, they have argued -- I think I've explained the
24 APA point and the -- and the injury point. They've also talked
25 about mandamus. And on mandamus, I'd like to draw the Court's

1 attention to the zone of interest test.

2 The Tenth Circuit had a very helpful discussion
3 about this in *Hernandez-Avalos v. Immigration and*
4 *Naturalization Service*. They said, a duty is owed in the
5 administrative context if plaintiff's interest is within the
6 zone of interest protected by the underlying statute.

7 Now, the zone of interest test that the Supreme
8 Court has -- has opined on and they've made it very clear, that
9 test is not meant to be especially demanding. You look to what
10 the zone of interest is to be protected or regulated by the
11 statute. And any benefit of the doubt, and this is this Court
12 in *King v. Sebelius*, quote, any benefit of the doubt about the
13 zone of interest should go to the plaintiff.

14 So, I don't think there is any doubt, Your Honor,
15 but if there was, we're entitled to the benefit of the doubt.
16 And I think it's very clear that Congress expected this program
17 to operate with cooperation from the states and from local
18 agencies. We are, if you will, Your Honor, we're out on the
19 front lines, you know, serving as the intermediaries, making
20 sure that the right people either don't get permits that
21 they're not entitled to, or in some cases we actually are
22 responsible for returning the firearms to people. And as
23 Sutherland Springs has demonstrated, getting that wrong has
24 consequences.

25 And one thing that I also note, Your Honor, in

1 their motion to dismiss they at no point argued that the relief
2 that we're seeking would not be a remedy. They at no point
3 argued that their act -- their inaction here was not the cause
4 of the harm that we've articulated. They have admitted that,
5 Congress and in written reports.

6 So, in brief, Your Honor, there's no question here
7 that plaintiffs have standing, we've been injured, we're
8 entitled to this information, and this Court has the ability
9 and -- and Justice Scalia made it very clear in *Norton* that --
10 he gave a great example which I think actually shows how easy
11 this case can be resolved. He talked about if the FCC was --
12 was required to issue regulations around the Telecommunications
13 Act in six months. He made it very clear. He said a Court
14 could do that. A Court could order the FCC to do so.

15 Here, both the actual disclosure and the timing of
16 it are clear. We're not asking, as the government's trying to
17 argue, what the regulations are. There's no debate about that.
18 It's turning the names and the fingerprint records so they can
19 be used, because we use them every day to make decisions that
20 affect public safety, that implement this program that Congress
21 and the DoD and the DOJ have created an entire repertory regime
22 around. We are clearly affected by their failure.

23 THE COURT: All right. I understand your position.
24 I'll look at this a little further and get you-all an answer as
25 quickly as I can.

1 MR. TABER: Thank you, Your Honor.

2 THE COURT: And we'll adjourn until Monday morning at
3 9:30.

4 THE LAW CLERK: All rise.

5 (PROCEEDINGS CONCLUDED AT 10:36 A.M.)

6 -o0o-

7

8 UNITED STATES DISTRICT COURT)

9 EASTERN DISTRICT OF VIRGINIA)

10

11 I, JULIE A. GOODWIN, Official Court Reporter for
12 the United States District Court, Eastern District of Virginia,
13 do hereby certify that the foregoing is a correct transcript
14 from the record of proceedings in the above matter, to the best
15 of my ability.

16 I further certify that I am neither counsel for,
17 related to, nor employed by any of the parties to the action in
18 which this proceeding was taken, and further that I am not
19 financially nor otherwise interested in the outcome of the
20 action.

21 Certified to by me this 22ND day of JUNE, 2018.

22

23

24

25

/s/
JULIE A. GOODWIN, RPR
CSR #5221
Official U.S. Court Reporter
401 Courthouse Square
Alexandria, Virginia 22314

Julie A. Goodwin, CSR, RPR

4/6/18

INDEX**APRIL 6, 2018**PAGE

| | |
|------------------------------------|----|
| Argument by Mr. Taber..... | 5 |
| Argument by Mr. Halainen..... | 15 |
| Further Argument by Mr. Taber..... | 20 |
| Argument by Mr. Dulani..... | 21 |
| Reporter's Certificate..... | 27 |

**_*_*